

Final Changes to Premerger (HSR) Process in the United States Adopted by Enforcement Agencies

Changes Impose Significant New Requirements Especially for Transactions with “Overlaps,” and For the First Time Require Parties to Submit Documents That Were Not Provided to an Officer or Director and Certain Ordinary Course Documents, as Well as Information About Customers

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The U.S. FTC and DOJ have finalized [major changes](#) to the pre-merger process in the United States under the Hart-Scott-Rodino (HSR) Act.

In June 2023, the FTC and DOJ proposed sweeping changes to the pre-merger process in the United States under the Hart-Scott-Rodino (HSR) Act. After much pushback from the business community, Congress, and the two Republican FTC Commissioners, the original proposal was scaled back somewhat. Even with these changes, the new rules, assuming they come into force, will impose extensive new information and document requirements on filers, particularly (but by no means exclusively) in transactions where the parties have an “overlap” or vertical relationship.

The changes will not affect whether a transaction is subject to the reporting requirements, only the information and documents required to be submitted with HSR filings.

The changes will come into force 90 days after they are published in the Federal Register, unless blocked by a court or disapproved by Congress. Because the new requirements are extensive, parties who contemplate a reportable transaction under the new rules should start planning as soon as possible.

In its [press release](#), the FTC also asserted that, once the new rules are in force, the agencies will resume granting early termination were warranted.

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Details on the New Rules

The new rules will divide acquisitions into three categories: (1) acquisitions where the acquiring person and target have an overlap or vertical relationship; (2) acquisitions where the acquiring person and the target do not have any overlap or any “vertical” relationship; and (3) so-called “select 801.30 transactions.” The new requirements will differ between the different types of transactions.

The below discussion does not cover all of the changes the new rules make and it is expected that the FTC will, consistent with its prior practice, issue guidance to address the application of the requirements to specific circumstances.

For all transactions, documents from a “Supervisory Deal Team Lead” will need to be collected and produced as well as all drafts that were provided to directors.

- A Supervisory Deal Team Lead will need to be identified, and documents that that person prepared or saw will need to be collected and submitted.
 - Filing parties (except for the acquired party in select 801.30 transactions) will be required to identify a single individual called the “supervisory deal team lead”, who “has primary responsibility for supervising the strategic assessment of the deal, and who otherwise would not qualify as director or officer.”
 - Filers will be required to locate and submit traditional “Item 4(c)” documents that were prepared by or for the Supervisory Deal Team Lead (or, as presently is the case, for an officer or director), and in particular, documents that “evaluat[e] or analyz[e] the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets.”

- The rules also clarify that any document provided to a director may not be withheld on the basis that it was a “draft.”

Where there are competitive overlaps between the buyer and the target, additional information and documents will need to be assembled and provided.

- Filing parties will be required to provide an “Overlap Description,” describ[ing] each of the principal categories of products and services (as reflected in documents created in the ordinary course of business) of the target” and, “list[ing] and briefly describ[ing] “each of the current or known planned products or services of the target that competes with (or could compete with) a current or known planned product or service of the acquiring person, based on documents created in the ordinary course of business.”
 - For each such overlapping product or service, filing parties will need to provide “[t]he sales (in dollars) for the most recent year” and “[a] description of all categories of customers of the target that purchase or use the product or service (e.g., retailer, distributor, broker, government, military, educational, national account, local account, commercial, residential, or institutional).” In addition “[t]he top 10 customers in the most recent year (as measured in dollars), and the top 10 customers for each customer category identified” will need to be provided.
 - Also for each overlap, filing parties will be required to provide “all regularly prepared plans and reports” that were provided to the Chief Executive Officer (CEO) or board of the acquiring entity or any entity that it controls or is controlled by it (or, as the case may be, the acquired entity or any entity that it controls or that is controlled by it) “that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description.”

- Where there is an overlap in revenues reported by NAICS code by the acquiring person and the target, the acquiring person will need to provide extensive information about its officers or directors “for all entities within the acquiring person responsible for the development, marketing, or sale of products or services that are identified as overlaps within the Overlap Description or as supply relationships within the Supply Relationships Description.” In particular:
 - A list of “all current officers and directors (or in the case of unincorporated entities, individuals exercising similar functions) and those who have served in one of these positions within the three months before filing that also serve as an officer or director of another entity that derives revenue in the same NAICS codes reported by the target” will need to be provided.
 - In addition, for each such individual, the names of all such entities of which the person is an officer or director, the overlap or NAICS code in question, and a list of “all such entities that have operations in the same industry, based on the knowledge or belief of the acquiring person or the identified individual” will need to be provided.
 - Where there is an overlap in revenues reported by NAICS code by the acquiring person and the target, certain additional information (including, in some instances, street-level data about the filer’s relevant locations) will need to be provided.
 - Where there is an identified overlap or an overlap in revenues reported by NAICS code by the acquiring person and the target, filers will need to provide information about prior acquisitions in the past five years and about certain Defense or Intelligence contracts.
 - This expands the prior requirement that acquiring (but not acquired) parties report such acquisition where the acquired entity or assets derived revenues in an overlapping NAICS code.
 - The Defense or Intelligence Contracts requirement is new, and will require the reporting of pending or awarded contracts valued at \$100 million or more that are or will be the source of revenue in an overlapping NAICS code or an identified overlapping product or service.
- Where there is a vertical relationship between the parties, filers will be required to provide other additional information.***
- Filers will also be required to identify vertical relationships, in particular “each product, service, or asset (including data) that the acquiring person has sold, licensed, or otherwise supplied, and which represented at least \$10 million in revenue (including internal transfers) in the most recent year (1) to the target, or (2) to any other business that, to the acquiring person’s knowledge or belief, uses the acquiring person’s product, service, or asset to compete with the target’s products or services, or as an input for a product or service that competes or is intended to compete with the target’s products or services.” In addition, for each such “product, service, or asset,” filers will be required to provide:
 - “The sales (in dollars) to (1) the target and (2) any other business that, to the acquiring person’s knowledge or belief, uses the acquiring person’s product, service, or asset to compete with the target’s products or services, or as an input for a product or service that competes or is intended to compete with the target’s products or services.”
 - “The top 10 customers (as measured in dollars) of the acquiring person that use the acquiring person’s product, service, or asset to compete with the target’s products or services, or as an input for a product or service that competes or is intended to compete with the target’s products or services.” For each such customer, filers will be required to “describe the acquiring person’s supply or licensing agreement (or other comparable terms of supply).”

- Filers will also be required to provide the officer and director information discussed in the previous section for transactions where there is a vertical relationship, for all for “all entities within the acquiring person responsible for the development, marketing, or sale of products or services that are identified as ... supply relationships.”
- The Defense or Intelligence Contracts information discussed in the previous section as pertaining to products or services identified in the description of supply relationships.

For all transactions, filers will be required to provide additional information about “minority shareholders or interest holders.”

- All 5% or greater minority holders of the ultimate parent entity, any entity it controls, and any entity created in connection with the transaction needs to be disclosed.
- All 5% or greater minority holders of the ultimate parent entity, any entity it controls, and any entity created in connection with the transaction also needs to be disclosed.
 - For limited partnerships, both the general partner (regardless of percentage held) and all 5% or greater limited partners must be disclosed.
 - In addition, “[i]f a minority holder is related to a master limited partnership, fund, investment group, or similar entity that does business under a common name, the d/b/a or ‘street name’ of such group” also needs to be listed, “if known to the acquiring person.”

For all transactions (other than “Select 801.30 Transactions”), filers will be required to organize their list of controlled entities “by operating company or operating business.”

- This is a change from the current requirement to simply list all controlled entities.

For all transactions, filers will be required to provide certain information about subsidies from foreign governments of concern and about products that are subject to countervailing duties or a current investigation for countervailing duties.

- Subsidies from governments of concern (currently China, Russia, North Korea, and Iran) will need to be disclosed, with a description of the subsidy.
- For any products that are subject to countervailing duties or are under a countervailing duty investigation, the product(s) and jurisdiction(s) will need to be provided.

A few of the new requirements will not apply to transactions in the “select 801.30 transactions” category.

- 801.30 transactions are transactions where the acquiring person acquires voting securities or non-corporate interests from a party other than the issuer (or the issuer’s subsidiary or direct or indirect parent).
- “Select 801.30 transactions” are defined as “transactions that do not result in the acquisition of control ... and where there is no agreement or contemplated agreement between any entity within the acquiring and acquired person.” They also “include acquisitions resulting from a traditional executive compensation arrangement where the executive exercises contractual benefits pursuant to a compensation package to acquire voting securities and nothing more.”
- For this type of transaction, the acquiring person will be excused from providing: information about its organization, a transaction rationale, a transaction diagram, ordinary course plans and reports, transaction agreements, an overlap description, information about supply relationships, and information about defense or intelligence contracts.
- The acquired person is excused from providing all of the new categories of information other than the newly required information about certain minority interest holders, the enhanced geographic

information, information about prior acquisitions, and information about subsidiaries from foreign entities or governments of concern. In addition, the acquired person does not need to provide documents from a Supervisory Deal Team Lead.

All foreign-language documents will need to be translated.

- New regulation 16 CFR 803.8 will require that all documents that are required to be submitted with a filing (or in response to a request for additional information, aka a “second request), “must be submitted with verbatim English language translations” and that “[a]ll verbatim translations must be accurate and complete.”
- The FTC specifically “decline[d]” to state that the “submission of machine translations is acceptable.”

Several of the more onerous items from the original proposal were dropped.

- The original proposal contained several onerous requirements that were dropped from the final rule. These include proposed requirements to create and provide:
 - a timeline of key dates for closing the proposed transaction;
 - organizational charts (although preexisting charts are required for many transactions, as discussed above);
 - information about “other interest holders”;
 - labor market and extensive information about employees;
 - information about “board observers”;
 - geolocation information;
 - information about prior small acquisitions and acquisitions from more than 5 years prior to the filing; and
 - information about steps used to preserve documents and about what messaging applications and systems are used by the filer.

- Several of the other original proposals were scaled back to only certain types of transactions or by introducing de minimis exceptions, or otherwise.

Potential Steps You Can Take Now

Each circumstance is different, but ahead of the effective date of the new rules, which is expected to be in early 2025, consider practical steps that can be implemented now for transactions that might require an HSR filing in 2025:

- Identify who the “Supervisory Deal Team Lead” is, and be mindful of the new requirements regarding document disclosure pertaining to that individual.
- Identify any transactions that might have NAICS code overlaps, competitive overlaps, or supply relationship overlaps.
 - Plan for the practical reality that filings for such transactions will not generally be practical within “10 business days” and be mindful of that when negotiating the “HSR provisions” of deal documents.
 - Consider beginning to develop the extensive new information that will be required to be submitted in such transactions, including information about overlaps and, for acquiring parties, information about officers and directors.

Also Consider developing the information that will be the same across filings.

- Develop a stock description of your “business operations.”
- Develop the more detailed entity organizational information and descriptions that will be required with acquiring person filings and identify a suitable existing organizational chart of entities.
- Develop the required revenue information, which is to say revenues from U.S. operations, inclusive of all entities from the ultimate parent down (note that under the new rules, ranges will be used)

- Investigate whether there are any subsidies from foreign governments of concern or relevant countervailing duties that are in place or under investigation.
- Develop the more detailed entity organizational information and descriptions that will be required with filings by acquiring persons, as well as

identifying a suitable existing organizational chart of entities.

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